

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ELLEN THIVIERGE,

No. C 05-0163 CW

Plaintiff,

v.

ORDER REGARDING
PLAINTIFF'S
MOTION FOR
ATTORNEYS' FEES

HARTFORD LIFE AND ACCIDENT INSURANCE
COMPANY AS ADMINISTRATOR AND
FIDUCIARY OF THE MILLS PENINSULA
HOSPITALS GROUP WELFARE PLAN NUMBER
506, and THE MILLS PENINSULA
HOSPITALS GROUP WELFARE PLAN NUMBER
506,

Defendants.

_____ /

Plaintiff Ellen Thivierge moves for attorneys' fees and costs, in the amount of \$78,562.93, incurred in prosecuting her claims for ERISA disability benefits. Defendant Hartford Life and Accident Insurance Company opposes the motion. The matter was submitted on the papers. Having considered all of the papers filed by the parties and the evidence cited therein, the Court finds that

1 Plaintiff is entitled to attorneys' fees and costs, but finds that
2 Plaintiff has not submitted the requisite evidence of the
3 prevailing market rates or a bill of costs itemizing taxable costs,
4 incurred in this action, that are recoverable under 28 U.S.C.
5 § 1920. The Court will give Plaintiff another opportunity to do
6 so, and Defendant an opportunity to respond.

7 BACKGROUND

8 In February, 1996, Plaintiff began receiving long-term
9 disability benefits. Plaintiff filed this suit against Defendant,
10 after Defendant terminated her long-term disability benefits in
11 December, 2003. On March 28, 2006, the Court granted Plaintiff's
12 motion for judgment and denied Defendant's cross-motion for summary
13 judgment. Reviewing de novo the administrative record, the Court
14 determined that there had been no significant change in Plaintiff's
15 condition. She still has good days, when she can function, and bad
16 days, when she cannot function. It is unpredictable whether
17 Plaintiff will have a good day or a bad day, and a full-time
18 employer cannot handle such inconsistent attendance and
19 unpredictability. The Court concluded that Plaintiff was entitled
20 to an award of benefits and awarded Plaintiff \$50,444.25 in
21 disability benefits plus prejudgment interest.

22 Plaintiff now moves to recover attorneys' fees in the amount
23 of \$76,743.75 and costs in the amount of \$1,819.18, totaling
24 \$78,562.93. In support of this request, Plaintiff has filed a bill
25 of costs. In addition, Plaintiff submits the declaration of her
26 attorney, Scott Kalkin, detailing his hourly billing rate and
27 professional experience. Mr. Kalkin attaches to his declaration a
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1 TimeSlips computer billing program print-out, providing the amount
2 of the time that he states that he has spent on this case since
3 March 12, 2004, and a copy of the National Law Journal's 2003 fee
4 survey. Mr. Kalkin states that his billing rate of \$375.00 is
5 within the normal range of fees charged by attorneys in the Bay
6 Area.

7 LEGAL STANDARD

8 ERISA provides that "the court in its discretion may allow a
9 reasonable attorney's fee and costs of action to either party."
10 29 U.S.C. § 1132(g)(1). The Ninth Circuit has adopted a five-part
11 test to determine whether attorneys' fees should properly be
12 awarded under ERISA: (1) the degree of the opposing party's
13 culpability or bad faith; (2) the ability of the opposing party to
14 satisfy an award of fees; (3) whether an award of fees against the
15 opposing party would deter others from acting in similar
16 circumstances; (4) whether the party requesting fees sought to
17 benefit all participants and beneficiaries of an ERISA plan or to
18 resolve a significant legal question regarding ERISA; and (5) the
19 relative merits of the parties' positions. Hummell v. S.E. Rykoff
20 & Co., 634 F.2d 446, 453 (9th Cir. 1980). No one of these Hummell
21 factors is decisive, and some may not be pertinent in a given case.
22 Smith v. CMTA-IAM Pension Trust, 746 F.2d 587, 590 (9th Cir. 1984);
23 Carpenters' S. Cal. Admin. Corp. v. Russell, 726 F.2d 1410, 1416
24 (9th Cir. 1984). The Hummell factors "reflect a balancing" and not
25 all factors must weigh in favor of a fee award. McElwaine v. U.S.
26 West, Inc., 176 F.3d 1167, 1173 (9th Cir. 1999).

27 The Ninth Circuit has stated that when applying the Hummell
28

1 factors, a district court "must keep at the forefront ERISA's
2 remedial purposes that 'should be liberally construed in favor of
3 protecting participants in employee benefit plans.'" Id. at 1172
4 (quoting Smith, 746 F.2d at 589). The court should consider
5 ERISA's purpose "to protect employee rights and to secure effective
6 access to federal courts." Smith, 746 F.2d at 589. Finally, a
7 motion for attorneys' fees in an ERISA case requires application of
8 a "special circumstances" rule under which a successful ERISA
9 participant "should ordinarily recover fees unless special
10 circumstances would render such an award unjust." Elliott v.
11 Fortis Benefits Ins. Co., 337 F.3d 1138, 1148 (9th Cir. 2003).

12 Courts calculate attorneys' fees under § 1132(g)(1) using the
13 hybrid lodestar/multiplier approach used by the Supreme Court in
14 Hensley v. Eckerhart, 461 U.S. 424 (1983). McElwaine, 176 F.3d at
15 1173. The lodestar/multiplier approach has two parts:
16 (1) the court determines the lodestar amount by multiplying the
17 number of hours reasonably expended in the litigation by a
18 reasonable hourly rate; and (2) the court may adjust the lodestar
19 upward or downward using a multiplier based on factors not subsumed
20 in the initial calculation.¹ Van Gerwen v. Guarantee Mutual Life

21
22 ¹ In awarding attorneys' fees, courts look at several factors:
23 (1) the time and labor required; (2) the novelty and difficulty of
24 the questions; (3) the skill requisite to perform the legal service
25 properly; (4) the preclusion of employment by the attorney due to
26 acceptance of the case; (5) the customary fee; (6) time limitations
27 imposed by the client or circumstances; (7) the amount involved and
28 the results obtained; (8) the experience, reputation, and ability
of the attorneys; (9) the "undesirability" of the case; (10) the
nature and length of the professional relationship with the client;
and (11) awards in similar cases. Van Gerwen, 214 F.3d at 1045 n.2
(citing Hensley, 461 U.S. at 430 n.3).

1 Co., 214 F.3d 1041, 1045 (9th Cir. 2000). The applicant seeking an
2 award of fees must submit evidence supporting the hours worked and
3 the rates claimed. Id. The court may reduce these hours if the
4 documentation is inadequate or if the hours are duplicative,
5 excessive or unnecessary. Id. There is a strong presumption that
6 the lodestar figure represents a reasonable fee, and a multiplier
7 may be used only in rare or exceptional cases where the lodestar is
8 unreasonably low or unreasonably high. Id.; Jordan v. Multnomah
9 County, 815 F.2d 1258, 1262 (9th Cir. 1987).

10 Determining a reasonable hourly rate is a critical inquiry.
11 Jordan, 815 F.2d at 1262 (citing Blum v. Stenson, 465 U.S. 886, 895
12 n.11 (1984)). The court must consider several factors, including
13 the experience, skill and reputation of the applicant. Chalmers v.
14 City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986), reh'g
15 denied, opinion amended on other grounds, 808 F.2d 1373 (9th Cir.
16 1987). The court must look to the rate prevailing in the community
17 for similar work performed by attorneys of comparable skill,
18 experience and reputation; it may not refer to the rates actually
19 charged to the prevailing party. Id. at 1210-11. It is the
20 applicant's burden to produce evidence, other than the declarations
21 of interested counsel, that "the requested rates are in line with
22 those prevailing in the community for similar services of lawyers
23 of reasonably comparable skill and reputation." Jordan, 815 F.2d
24 at 1263.

25 DISCUSSION

26 I. Attorneys' Fees Under ERISA

27 Plaintiff argues that the five Hummell factors weigh in favor
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1 of awarding attorneys' fees and that there are no special
2 circumstances which would render an award unjust. Defendant argues
3 that the Hummell factors do not support an award of attorneys'
4 fees, but do not argue that special circumstances exist or apply.
5 The Court discusses each factor in turn.

6 A. Bad Faith or Culpability

7 Plaintiff contends that Defendant's bad faith and culpability
8 is manifest. Defendant notes that the Court did not find that
9 Defendant abused its discretion in denying Plaintiff's claim, but
10 rather, the Court determined, on a de novo review, that Plaintiff
11 was entitled to benefits. Defendant asserts that, because its
12 denial of Plaintiff's claim was supported by three physicians, its
13 position was substantially justified and thus this factor weighs
14 against awarding attorneys' fees. That is incorrect. As the Court
15 found in its prior order, the two doctors who reviewed Plaintiff's
16 records, and did not examine Plaintiff, offered no convincing
17 evidence to show that Plaintiff could work an eight-hour day, even
18 at a sedentary job. And the one doctor who examined Plaintiff
19 based his opinion only on how Plaintiff was feeling and performing
20 on the day he examined her and did not discuss Plaintiff's
21 abilities to perform objective functions for any prolonged period
22 of time. Although Defendant may not have acted in bad faith, its
23 unjustified reliance on the three doctors demonstrates a level of
24 culpability. Therefore, the Court concludes that this factor
25 weighs in favor of awarding attorneys' fees and costs. See Smith,
26 746 F.2d at 590 (noting that bad faith is not required to justify a
27 fee award).

1 D. Benefit

2 Defendant argues that, because Plaintiff brought this suit
3 only on behalf of herself and not any other plan participants, this
4 factor does not support an attorneys' fees award. But a plaintiff
5 can benefit other plan participants without bringing an ERISA class
6 action. In Smith, the court found that a decision clarifying the
7 terms of a plan after litigation would benefit all participants and
8 beneficiaries by settling a disputed provision or ambiguity. 746
9 F.2d at 590. Here, the parties disputed the correct standard of
10 review. As Plaintiff notes, the Court's determination that de novo
11 review applies to the plan at issue could make it easier for other
12 plan participants to obtain their benefits.

13 This factor weighs in favor of awarding attorneys' fees and
14 costs.

15 E. Relative Merits of the Parties' Positions

16 Defendant argues that the Court did not conclude that its
17 decision did not have merit or that it abused its discretion in
18 making its decision and thus its position had merit and was
19 supported by the record. By ruling in favor of Plaintiff, however,
20 the Court determined that Defendant's position was wrong and
21 Plaintiff's benefits should not have been terminated based on the
22 evidence Defendant presented.

23 In Smith, the Ninth Circuit stated, "The fifth Hummell factor,
24 the relative merits of the parties' positions, is, in the final
25 analysis, the result obtained by plaintiff." Id. Based on the
26 Court's judgment in favor of Plaintiff, the Court finds that the
27 fifth factor weighs in favor of awarding attorneys' fees.

1 All the Hummell factors weigh in favor of awarding Plaintiff
2 attorneys' fees.

3 II. Fee Calculation

4 Plaintiff seeks to recover attorneys' fees for 204.65 hours of
5 work based on an hourly rate of \$375.00. Defendant argues that
6 neither Mr. Kalkin's hourly rate nor the amount of time expended is
7 reasonable. Plaintiff disagrees. She contends that her attorney's
8 qualifications and experience as set forth in Mr. Kalkin's
9 declaration support his hourly rate; Mr. Kalkin represents that
10 there are ERISA litigation clients in his office who pay \$375.00 an
11 hour. As explained in Chalmers, however,

12 Determination of a reasonable hourly rate is not made by
13 reference to rates actually charged the prevailing party.
14 In determining a reasonable hourly rate, the district court
15 should be guided by the rate prevailing in the community for
16 similar work performed by attorneys of comparable skill,
17 experience, and reputation.

18 796 F.2d at 1210-11 (citations omitted). As noted above, the fee
19 applicant has the burden of producing satisfactory evidence that
20 the requested hourly rates are reasonable based on the prevailing
21 market rates. But Plaintiff offers no such evidence of the
22 prevailing market rates in the community for ERISA attorneys of
23 comparable skill, experience and reputation to Mr. Kalkin.

24 Instead, she attaches a December, 2003 article from the National
25 Law Journal regarding rates of various firms throughout the
26 country. This dated article offers the Court no guidance in
27 determining a reasonable hourly rate for an ERISA attorney in the
28 Bay Area with comparable skill, experience and reputation. Nor
does Mr. Kalkin's statement that, based on discussions with other

1 attorneys who handle ERISA benefits litigation, it is his opinion
2 that a billing rate of \$375.00 per hour is within the normal range
3 of fees charge by attorneys in the Bay Area. See Jordan, 815 F.2d
4 at 1263. Accordingly, to receive an award of attorneys' fees,
5 Plaintiff must submit evidence of the prevailing market rates in
6 order to determine reasonable hourly rates for Plaintiff's
7 attorney.

8 In addition, Plaintiff makes no showing that the time spent
9 was reasonably necessary. The Supreme Court instructs, "Counsel
10 for the prevailing party should make a good faith effort to exclude
11 from a fee request hours that are excessive, redundant, or
12 otherwise unnecessary." Hensley, 461 U.S. at 434. No such effort
13 appears to have been made here. Instead, Plaintiff seeks fees for
14 hours her attorney spent on her administrative appeal, even though
15 fees are not available for the administrative portion of an ERISA
16 appeal. McElwaine, 176 F.3d at 1172 n.8; Dishman v. UNUM Life Ins.
17 Co. of Am., 269 F.3d 974, 987 n.51 (9th Cir. 2001) ("ERISA's
18 attorneys' fees provision does not allow fees for the
19 administrative phase of the claims process.").

20 III. Costs

21 Plaintiff seeks to recover costs in the amount of \$1,819.18
22 for the court filing fee, copies of the administrative record and
23 trial exhibits, the mediator's fee and the fee "charged by CPA for
24 computation of interest." Although not noted by either party,
25 the Ninth Circuit has interpreted the "costs of action" provided in
26 ERISA § 1132(g)(1) to allow reimbursement of "only the types of
27 'costs' allowed by 28 U.S.C. § 1920, and only in the amounts

1 allowed by section 1920 itself" Agredano v. Mutual of
2 Omaha Cos., 75 F.3d 541, 544 (9th Cir. 1996). Section 1920 permits
3 the taxing of costs for the following:

4 (1) Fees of the clerk and marshal; (2) Fees of the court
5 reporter for all or any part of the stenographic transcript
6 necessarily obtained for use in the case; (3) Fees and
7 disbursements for printing and witnesses; (4) Fees for
8 exemplification and copies of papers necessarily obtained for
9 use in the case; (5) Docket fees under section 1923 of this
10 title; (6) Compensation of court appointed experts,
11 compensation of interpreters, and salaries, fees, expenses,
12 and costs of special interpretation services under section
13 1828 of this title.

14 Defendant does not dispute any of the costs Plaintiff seeks to
15 recover, other than to note that Plaintiff charges an undisclosed
16 portion of 0.9 hours to compute interest on judgment, even though
17 her bill of costs includes a charge of \$160 incurred by a CPA to
18 complete that task. Nonetheless, only some of the costs listed in
19 Plaintiff's Bill of Costs are recoverable under section 1920.

20 CONCLUSION

21 The Court GRANTS Plaintiffs' Motion for Attorneys' Fees and
22 Costs (Docket No. 36) IN PART. The Court concludes that Plaintiff
23 is entitled to attorneys' fees and costs, and grants Plaintiff
24 twenty-one days from the date of this order to submit evidence of
25 the prevailing market rates and to make a showing that the time her
26 attorney spent on this case was reasonably necessary and that a
27 good faith effort was made to exclude from her fee request hours
28 that were excessive, redundant or unnecessary. In addition,
Plaintiff has twenty-one days from the date of this order to submit
a revised bill of costs, listing only those costs recoverable under
section 1920. Defendants will have fourteen days to file any

1 opposition, and Plaintiff will have seven days to reply.

2 IT IS SO ORDERED.

3 Dated: 7/10/06



CLAUDIA WILKEN
United States District Judge